(1)

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JAMES LANGFORD,

Petitioner

-v-

KURT JONES, Warden

Respondent.

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner James Langford was convicted of first degree murder at a jury trial, at which we submit serious constitutional error occurred. He was sentenced to life in prison. Habeas Corpus was denied.

The questions presented are:

QUESTION 1: WHETHER IT DENIES DUE PROCESS AND THE RIGHT OF CONFRONTATION FOR THE PROSECUTOR TO TELL THE JURY THAT AN IMPORTANT DEFENSE WITNESS WAS OUT IN THE HALLWAY LAUGHING ABOUT THE STORY SHE TOLD, WHERE THE PROSECUTOR NEVER PRESENTS A WITNESS TO THE ALLEGED WITNESS CONDUCT.

QUESTION 2: WHETHER THE LOWER COURTS ARE USING THE CORRECT STANDARD TO FIND "OVERWHELMING" EVIDENCE, TO THEREBY FIND ALL ERRORS TO BE HARMLESS AND DENY A CERTIFICATE OF APPEALABILITY, IN A CASE THAT IS FAR FROM OVERWHELMING, AND RESULTED IN A HUNG JURY AT THE FIRST TRIAL WITHOUT THESE ERRORS.

QUESTION 3: WHETHER, IN A CASE BASED ON THE WORD OF ONE WITNESS TESTIFYING UNDER AN AGREEMENT WITH THE PROSECUTION, IT WAS CONSTITUTIONAL TO EXCLUDE EVIDENCE OF THE BENEFITS THE WITNESS WOULD GET FROM THE DEAL.

QUESTION 4: WHETHER, IN A HOMICIDE CASE WITH SUBSTANTIAL EVIDENCE OF ACCESSORY

AFTER THE FACT, AND MUCH WEAKER EVIDENCE OF INVOLVEMENT IN THE KILLING, IT DENIES DUE PROCESS TO DENY THE DEFENSE REQUEST TO INSTRUCT THE JURY ON THE CRIME OF ACCESSORY AFTER THE FACT.

QUESTION 5: WHERE THE DEFENDANT WISHES TO TESTIFY, WHETHER "WAIVER BY INACTION" OF THE PERSONAL RIGHT TO TESTIFY REQUIRES THAT SOMEONE INFORM THE DEFENDANT THAT THIS IS THE TIME TO SPEAK UP IF HE DOES WISH TO TESTIFY.

QUESTION 6: WHETHER FAILURES TO OBJECT TO ERRORS, AND FAILURE TO EXPOSE A MAJOR CHANGE IN TESTIMONY BETWEEN THE FIRST AND SECOND TRIALS, AMOUNTED TO INEFFECTIVE ASSISTANCE OF COUNSEL.

QUESTION 7: WHETHER THE STATE AND FEDERAL COURTS IMPROPERLY REFUSED TO HOLD AN EVIDENTIARY HEARING ON PETITIONER'S CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL AND DENIAL OF RIGHT TO TESTIFY.

TABLE OF CONTENTS

QUESTIONS PRESENTED	i
TABLE OF CONTENTS	iii
INDEX OF AUTHORITIES	iv
OPINIONS BELOW	2
STATEMENT OF JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	4
STATEMENT OF PROCEEDINGS	4
STATEMENT OF FACTS	5
REASONS FOR GRANTING THE WRIT	10
QUESTION I	10
QUESTION II	14
QUESTION III	17
QUESTION IV	19
QUESTION V	23
QUESTION VI	26
QUESTION VII	26
CONCLUSION	27
APPENDIX	A1
Sixth Circuit order, 1/9/07	A1
District Court order, 10/24/06	A3
District Court ruling, 7/7/06	A10
Michigan Supreme Court order, 12/30/03	A31
Michigan Court of Appeals opinion 7/1/03	A32

INDEX OF AUTHORITIES

Cases

Alicea v. Gannon, 675 F.2d 913 (7th Cir. 1982) 24
Barker v. Yukins, 199 F.3d 867 (6th Cir. 1999) 16
Brecht v. Abrahamson, 507 U.S. 609; 113 S.Ct. 1710; 123 L.Ed.2d 353 (1993) 16, 17, 21
Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) 16
Crawford v Washington, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004) 13
Davis v. Alaska, 415 U.S. 308; 94 S.Ct. 1105; 39 L.Ed.2d 347 (1974) 13
Donnelly v. DeChristoforo, 416 U.S. 637; 94 S.Ct. 1868; 40 L.Ed.2d 431 (1974) 14
Eddleman v. McKee, 471 F.3d 576 (6th Cir. 2006) 16
Ferrazza v. Mintzes, 735 F.2d 967 (6th Cir. 1985) 20
Giglio v. United States, 405 U.S. 150; 92 S.Ct. 763; 31 L.Ed.2d 104 (1972) 18
Hohn v. United States, 524 U.S. 236 (1998) 2
Johnson v. Zerbst, 304 U.S. 458; 58 S.Ct. 1019; 82 L Ed 1461 (1938) 23
Keeble v. United States, 412 U.S. 205; 93 S.Ct. 1993; 36 L.Ed. 2d 844 (1973) 20
Lee v. Illinois, 476 U.S. 530; 106 S.Ct. 2056; 90 L.Ed.2d 514 (1986) 13
Lilly v. Virginia, 527 U.S. 116; 119 S.Ct. 1887; 144

L.Ed.2d 117 (1999) 13
Michael Williams v. Taylor, 529 U.S. 420; 120 S.Ct. 1479; 146 L.Ed.2d 435 (2000) 26
Miller-El v. Cockrell, 537 U.S. 322; 23 S.Ct. 102; 154 L.Ed.2d 931 (2003) 16, 17, 22
Mitchell v. Esparza, 540 U.S. 12, 124 S.Ct. 7 (2003) 16
O'Neal v. McAninch, 513 U.S. 432; 115 S.Ct. 992; 130 L.Ed.2d 947 (1995) 16
People v. Curtis, 681 P.2d 504 (Colo, 1984) 23
People v. Karst, 118 Mich. App. 34 (1982) 20
People v. Lucas, 402 Mich. 302 (1978) 20
People v. Reed, 393 Mich. 342 (1975) 14
People v. Wiese, 425 Mich. 448 (1986) 18
Rock v. Arkansas, 483 U.S. 44; 107 S.Ct. 2704; 97 L.Ed.2d 37 (1987) 23, 25
Schad v. Arizona, 501 U.S. 624; 111 S. Ct. 2491; 115 L.Ed.2d 555 (1991) 21, 22
Spaziano v. Florida, 468 U.S. 447 (1984) 21
Sullivan v Louisiana, 508 US 275; 113 S Ct 2078; 124 L Ed 2d 182 (1993) 16
Turner v. Louisiana, 379 U.S. 466; 85 S.Ct. 546; 13 L.Ed.2d 424 (1965) 14
United States ex rel Shaw v. DeRobertis, 755 F.2d 1279 (7th Cir. 1985) 12, 13
United States v. Crutchfield, 547 F.2d 496 (9th Cir. 1977) 20
United States v. Curtis, 742 F.2d 1070 (7th Cir. 1984) 24
United States v. Leon, 534 F.2d 667 (6th Cir. 1976) 13
United States v. Teague, 908 F.2d 752 (11th Cir. 1990) 24
Vujosevic v. Rafferty, 844 F.2d 1023 (3d Cir.1988) 20

Constitutional Provisions

U.S. Const., Amend XIV	16
U.S. Const., Amend. VI	2
U.S. Const., Amend. XIV	3, 13

Statutes

28 U.S.C. §1254	2
M.C.L. 750.505	19, 20

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PETITION FOR A WRIT OF CERTIORARI

JAMES LANGFORD, Petitioner, by and through his attorney, James S. Lawrence, moves this Court to issue a Writ of Certiorari to review the ruling of the Sixth Circuit Court of Appeals of January 9, 2007, denying a Certificate of Appealability on the District Court order of July 7, 2006, denying a Petition for Habeas Corpus.

OPINIONS BELOW

The Appendix includes the order of the Sixth Circuit Court of Appeals of January 9, 2007, order of the United States District Court of October 24, 2006, opinion of the United States District Court of July 7, 2006, order of the Michigan Supreme Court of December 30, 2003, opinion of the Michigan Court of Appeals of July 1, 2003.

STATEMENT OF JURISDICTION.

This case began as a criminal prosecution in Wayne County, Michigan, Circuit Court. The original judgment was entered February 16, 2001. The Michigan Court of Appeals affirmed July 1, 2003. The Michigan Supreme Court denied leave to appeal December 30, 2003. The Judgment of the United States District Court denying Habeas Corpus was July 7, 2006. The order of the District Court denying Certificate of Appealability was July 7, 2006, renewed October 24, 2006. The ruling of the Sixth Circuit Court of Appeals denying Certificate of Appealability was issued January 9, 2007. This Court has jurisdiction under 28 U.S.C. §1254 to review the final judgment of the United States Court of Appeals, see *Hohn v. United States*, 524 U.S. 236 (1998) [Habeas Corpus petitioner can file Petition for Writ of Certiorari regarding Habeas Corpus case where United States Court of Appeals denied Certificate of Appealability].

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendnent to the United States Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the United States Constitution provides:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Statement of Proceedings

Petitioner James Langford was charged in Wayne County Circuit Court with several crimes: first degree murder, first degree felony murder, 4 counts of assault with intent to murder, armed robbery, 2 counts of extortion, 2 counts of kidnapping, and felony firearm. Case No. 99-0610-02. The first trial before Wayne Circuit Judge Vonda Evans resulted in a hung jury. The second trial before Judge George W. Crockett III resulted in convictions on all counts. On February 16, 2001, Judge Crockett imposed sentences for first degree murder (life), felony firearm (2 years), and 4 counts of assault with intent to murder (60-90, 40-60, 30-60, and 30-60). The other counts were dismissed as duplicative under double jeopardy. (ST, 10-11-16). The Michigan Court of Appeals affirmed on July 1, 2003. Case No. 235163. The Michigan Supreme Court denied leave to appeal December 30, 2003. Case No. 124397.

Separately tried in the incident were codefendants Montez Moore, Thomas Culbreath, and D'Andre Coffey. Codefendant Eugene Childrey testified as a prosecution witness and made a deal to plead to armed robbery and kidnapping with a sentence agreement of 5 to 15 years. (T VI, 10-11).

The case involved a great deal of local publicity because of the death of police officer Sean Bandy, who was shot to death from the fleeing van.

Petitioner through counsel filed a Petition for Habeas Corpus in the United States District Court. On July 7, 2006,

Judge Bernard A. Friedman denied Habeas Corpus and a Certificate of Appealability. He issued another order denying Certificate of Appealability October 24, 2006. The Sixth Circuit Court of Appeals denied a Certificate of Appealability on January 9, 2007.

Statement of Facts

Off. David Pomeroy testified that on December 5, 1998, he was called upon to join the chase of a blue van that was reported to have been involved in a kidnapping. (T III, 72-78). He and other officers came under fire from the van at Westphalia south of Nashville in Detroit. While he was not hit, he saw Officers Childs and Todds sustain wounds. (T III, 83-84). Later, he identified a van found parked on Flanders St. as being the van. (T III, 93). Off. Ramon Childs and Off. Jeffrey Bonner gave similar testimony.

Dr. John Somerset testified that Shawn Bandy died from multiple gunshot wounds. (T IV, 111).

FBI Agents Shawn Van Slyke and Ralph Brumley testified that on December 11, 1998 they set up a perimeter to surround a house in Erie, PA where Petitioner Langford and Montez Moore were inside. (T V, 63-66, 105, 109-110). Agent Brumley testified that Petitioner Langford invited the agents inside, but warning that he would "raise the AK" and that Moore would "raise the Daewoo" (both types of machine guns, T V, 156), and that they would come out with their "fullies" (fully automatic weapons, T V, 156) and body armor. (T V, 152-153, 198-199).

Eugene Childrey testified he had a deal to plead to lesser offenses, to get 5 to 15 years, and to testify that

Childrey was part of the crime and so was Petitioner Langford. (T VI, 10-11). Childrey testified that Petitioner was involved in a kidnapping plot (T VI, 30-36), and that while escaping Petitioner was driving the van and ordered separately tried codefendant Montez Moore to begin shooting. (T VI, 49). Later, the men involved in the crime met at a house on Roxbury Street. (T VI, 53-55).

Childrey testified that he and Petitioner went into a Radio Shack to buy walkie-talkies to use in the kidnapping. (T VI, 24). He admitted being the only one in the van who was not wearing gloves. (T VI, 82). He admitted that when he went to a lineup he picked someone other than Petitioner. (T VI, 87). He stated that he intentionally picked out an innocent man. (T VII, 19).

Antonio Barnett testified his uncle is codefendant Montez Moore. He had a deal with the prosecution to testify in exchange for not being charged. (T VII, 33-35). On Sunday after the killings, he was at Shafina's house on Saratoga, and Petitioner was there with Montez Moore. A report about the crimes came on the news. Petitioner stated that the news report was a lie because he had not raped anyone. (T VIII, 37-39). In the transcript of the first trial of April 18, 2000, not heard by this jury, Antonio Barnett testified that Petitioner stated the news report was a lie because he had not kidnapped anyone. (T Apr 18 2000, 36). On Monday, he arranged for Tanisha Wimbley to drive Petitioner Langford to Erie, PA, for which Petitioner paid $500. Antonio Barnett and Chucky Bell came along. (T VIII, 45-46, 50).

Tanisha Wimbley testified that Antonio Barnett asked

her to drive him and other men to Erie, PA. She saw no weapons or bulletproof vests. It was Barnett who paid her the $500. (T IX, 6-10).

Athena Akins testified that she was with her 12 year old child Leroy when she returned to her house at 13670 Carlisle on December 5, 1998 around 8:30 p.m. Four men with masks and guns jumped out of a van and forced them in the van. The victims were handcuffed. (T IX, 15-20). The men asked for car keys, house keys, her alarm codes, her rings, and took money from her purse. They drove her to an ATM, but she was unable to get money. Then all the men but the driver began hitting her. (T IX, 22-25).

She was forced to make a call to her boyfriend Eric Anthony. The men demanded $100,000 as a ransom. They finally agreed to accept $10,000. (T IX, 26-27). The driver sent men into her house to look for items to steal, and used walkie-talkies to communicate. The men returned with bags of clothing and coats. (T IX, 30-31).

The men went and picked up a bag of money that was left for them one block from Schoenherr St. Then, they counted the money, then dropped her and Leroy out of the van at Carlisle and Brook. (T IX, 35-37). She still had on her handcuffs. (T IX, 40).

At the lineup, she identified Jamal Randall as the driver. She falsely identified him, even though she never saw the driver's face, because she had heard that Jamal Randall and Darryl Boggan planned to kidnap her, because Randall was mad at Eric Anthony about gambling debts. (T IX, 43-45, 57, 64). She admitted she never saw Petitioner in the van. (T IX, 84).

Natasha Dominick testified that Eugene Childrey came in to buy walkie-talkies with a man in his 40s, not Petitioner. (T IX, 87-91).

Inv. Lampton Johnson testified that the van was registered to Kelli Crockett. (T IX, 100). A man named Cordell Gibson told him that Jamal Randall was seen on Dec 5th running from the vicinity of the parked van, and said "we had to shoot these ho' ass police." (T IX, 103-107).

Sgt. David Babcock testified that he found a box of Swisher Sweet cigars in the van, with one cigar left. He lifted a fingerprint. (T IX, 127). Off. Lloyd Todd testified that he joined the chase of the van and was shot in the eye. (T IX, 139-141).

Sgt. Danny Reed testified that all 19 shots fired came from the same weapon, and the casings found were .223 caliber. (T IX, 145-147).

Attorney Delphia Burton testified that eyewitness Mark Calvin Jr., deceased by the time of trial, went to a lineup and identified Darryl Boggan as being the man he saw driving the van that kidnapped Athena Akins. (T X, 144-147).

Tina Alexander, a Southfield police officer and sister of Petitioner Langford, testified that she went to the Detroit Police Department and met with Inv Rice. Rice allowed her to listen to his call with Petitioner. Petitioner did not confess or say anything about not intending to shoot the officers. (T X, 151-163).

Sandra Miller, an employee and group leader at Textron Automotive, testified that on the night of the incident, she went to Roxbury Street and saw Petitioner Langford speaking to a man. Petitioner was inquiring "what the F was

going on." The man Petitioner was speaking to apologized to Langford for getting his van "caught up in some shit." (T XI, 28-30). She identified a photo of Eugene Childrey as the man who made the statement to Petitioner. (T XI, 33).

Off. Derryck Thomas testified that deceased witness Mark Calvin, Jr. had identified in a lineup Darryl Boggan as the driver of the van that kidnapped Athena Akins. (T XI, 64).

REASONS FOR GRANTING THE WRIT

QUESTION 1: WHETHER IT DENIES DUE PROCESS AND THE RIGHT OF CONFRONTATION FOR THE PROSECUTOR TO TELL THE JURY THAT AN IMPORTANT DEFENSE WITNESS WAS OUT IN THE HALLWAY LAUGHING ABOUT THE STORY SHE TOLD, WHERE THE PROSECUTOR NEVER PRESENTS A WITNESS TO THE ALLEGED WITNESS CONDUCT.

It is our position that there are some methods of impeaching a defense witness that are so improper as to deny due process and the right of confrontation. Where the impeaching evidence consists entirely of prosecution assertion about an event in the hallway, made to the jury after the impeached witness was gone, important constitutional safeguards designed to promote the truth-seeking process are dispensed with.

Prosecutor James Langford was convicted of first degree felony murder. The case arose from a kidnapping for ransom, the escape from which resulted in the death of a police officer. Eugene Childrey was the only witness to testify that Petitioner had a role in the events at all.

However, there was also the fact that the van used in the crime was owned by Petitioner's girlfriend. Witness Sandra Miller testified that after the crime, Petitioner Langford caught up with Eugene Childrey. Petitioner inquired "what the F was going on." Childrey apologized to Langford for getting his van "caught up in some shit." (T XI, 28-30, 33).

Prosecutor Kevin Simowski cross-examined her

vigorously in an attempt to shake her testimony, but she remained firm. (T XI, 38-50, 52-57). He asked "You are just making up this story, aren't you?" and she said no. (T XI, 56).

If Sandra Miller were believed by the jury, that would be a persuasive reason for them to reject Eugene Childrey's testimony that Petitioner was in the van and helping to commit the crimes. If Petitioner had participated in the crimes, he would have no reason to ask what had happened, and Childrey would have no reason to explain to Petitioner what had happened.

During cross-examination of defense investigator Ishmael Muhammad, the witness responded that he cannot arrest witnesses to pressure them, like the police did by arresting witness Miller as soon as she was done testifying. (T XI, 173). The prosecutor then decided to tell the jury that Ms. Miller had taken certain actions in the hallway. (T XI, 174):

> "Q Was this after Ms. Miller got out of the courtroom and was laughing about the story she told? Is that what you are talking about?
>
> A When she was doing what? That is a lie.
>
> THE COURT: What is a lie?
>
> THE WITNESS: That she was laughing about the story she told.

THE COURT: How would you know?

THE WITNESS: I was out there."

There is no doubt that prosecutor Simowski made a positive statement of fact to the jury, that "Ms. Miller got out of the courtroom and was laughing about the story she told." Indeed, if there had been no statement of fact by the prosecutor, the witness would not have had anything to declare to be a lie.

Although he made no effort to call a witness to prove his assertions, in closing argument, the prosecutor returned to this theme (T XII, 134):

> "Sandra Miller is somebody they pulled out of their pocket, a friend of his child's mother who is up here giggling. All right. Because you ran out of the van, because the van was shot out, the running board was broken. And that's why this Sandra Miller, it's a big joke."

Twice the prosecutor told the jury that Sandra Miller left the courtroom and laughed about the story she had told. However, the prosecutor forgot about fundamental constitutional principles, the same principles overlooked by the prosecutor in *United States ex rel Shaw v. DeRobertis*, 755 F.2d 1279, 1281 (7th Cir. 1985); "The prosecutor violated the fundamental rule, known to every attorney, that argument is limited to the facts in evidence." These actions denied Petitioner due process of law. U.S. Const., Amend.

XIV.

Here, the credibility of defense witness Sandra Miller was destroyed, not by testimony subject to cross-examination, but by bald assertion by the prosecutor, not backed up with any witness. Prosecutor Simowski did not even **try** to call a witness to support his claims that Miller was out in the hallway laughing about her "story."

This was the only information in the case to discredit Miller, and was not supported by any witness, only by prosecutor assertion. Even a single instance of this would be enough to reverse, as it was in *Berger v. United States*, 295 U.S. 78; 55 S.Ct. 629; 79 L Ed 1314 (1935).

It is improper for the prosecutor to provide the trier of fact with an account of facts that do not appear in the testimony. To do so is for the prosecutor to unlawfully assume the role of witness. *Berger v. United States*, supra; *United States v. Leon*, 534 F.2d 667, 679 (6th Cir. 1976); *United States ex rel Shaw v. DeRobertis*, 755 F.2d 1279 (7th Cir. 1985); U.S. Const., Amend. VI. Because the accused cannot cross-examine a prosecutor who does not take the stand, such actions by the prosecutor violate the fundamental right of confrontation through cross-examination.

The right of a defendant to cross-examine the witnesses against him is recognized under the U.S. Constitution as being the most fundamental of rights. *Davis v. Alaska*, 415 U.S. 308; 94 S.Ct. 1105; 39 L.Ed.2d 347 (1974); *Lee v. Illinois*, 476 U.S. 530; 106 S.Ct. 2056; 90 L.Ed.2d 514 (1986); *Lilly v. Virginia*, 527 U.S. 116; 119 S.Ct. 1887; 144 L.Ed.2d 117 (1999); *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004); *People v. Reed*, 393

Mich. 342 (1975). Prosecutor Simowski told the trier of fact that witness Miller had taken certain actions that were tantamount to a confession of having lied, and Petitioner was powerless to cross-examine either Simowski or anyone else about it. The prosecutor added enormously to the case against Petitioner, not by referring to testimony in the case, but by assertion alone.

"In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of a defendant's right of confrontation, of cross-examination, and of counsel." *Turner v. Louisiana*, 379 U.S. 466, 472-473; 85 S.Ct. 546; 13 L.Ed.2d 424 (1965).

In *Donnelly v. DeChristoforo*, 416 U.S. 637; 94 S.Ct. 1868; 40 L.Ed.2d 431 (1974), the U.S. Supreme Court held that when a prosecutor's comments violate an explicitly granted right under the Constitution, the comments would be held to be a constitutional violation subject to correction on habeas corpus. The right of confrontation was violated, and it is a right found expressly in the Constitution.

The prejudicial nature of the error is discussed in Question 2.

QUESTION 2: WHETHER THE LOWER COURTS ARE USING THE CORRECT STANDARD TO FIND "OVERWHELMING" EVIDENCE, TO THEREBY FIND ALL ERRORS TO BE HARMLESS AND DENY A CERTIFICATE OF APPEALABILITY, IN A CASE THAT IS FAR FROM OVERWHELMING, AND RESULTED IN

A HUNG JURY AT THE FIRST TRIAL WITHOUT THESE ERRORS.

The District Court found constitutional errors in Issue I and Issue III, but found they were harmless error because of the "overwhelming evidence" and the "strong evidence." The District Court never stated a standard by which the overwhelming nature of evidence should be judged, nor did the District Court refer to precisely which testimony made the evidence overwhelming.

Only one witness testified that Petitioner had any role in the crime, Eugene Childrey. He was testifying under an agreement with the prosecutor's office. (T VI, 10-11).

Childrey testified that Petitioner was the driver of the van involved in the kidnapping of Athena Akins and her son for ransom. (T VI, 30-36, 49). In a lineup he picked someone other than Petitioner, and explained it by testifying that he intentionally incriminated an innocent man. (T VI, 87; T VII, 19) .

Ms. Akins, the kidnap victim, testified she never saw Petitioner in the van (T IX, 84), and at a lineup identified Jamal Randal as being the driver. (T IX, 43-45, 57, 64).

Sandra Miller testified that Petitioner learned of the events involving his girlfriend's van he loaned to Childrey only after the fact. (T XI, 28-30, 33). As noted above, her testimony was impeached by the prosecutor without a witness, after she left the courtroom.

The evidence was not overwhelming to the first jury, before Judge Vonda Evans, who were dismissed as a hung jury. Significantly, the first trial did not have the

constitutional errors found at the second trial.

We submit under these circumstances, it is unreasonable to find overwhelming evidence, and unreasonable to deny a Certificate of Appealability. *Miller-El v. Cockrell*, 537 U.S. 322; 23 S.Ct. 102; 154 L.Ed.2d 931 (2003).

If there is grave doubt about whether a trial error of federal law had substantial and injurious effect or influence in determining the jury's verdict, the error is not harmless. *O'Neal v. McAninch*, 513 U.S. 432; 115 S.Ct. 992; 130 L.Ed.2d 947 (1995); *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993).

Interestingly, in *Eddleman v. McKee*, 471 F.3d 576 (6th Cir. 2006), the Court interpreted this Court's ruling in *Mitchell v. Esparza*, 540 U.S. 12, 124 S.Ct. 7 (2003) as abandoning the *Brecht* standard for the stricter standard of "harmless beyond a reasonable doubt" of *Chapman v. California,* 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). This case would give the Supreme Court the opportunity to determine whether that is true. If it is, then the error here is even more egregious.

Under either the *Brecht* or *Chapman* standards, it denies due process for the reviewing court to engage in speculation or act as alternate jury in finding harmless error. *Sullivan v Louisiana*, 508 US 275; 113 S Ct 2078; 124 L Ed 2d 182 (1993); *Barker v. Yukins*, 199 F.3d 867 (6th Cir. 1999); U.S. Const., Amend XIV. Yet, that is exactly what the courts do when they discard the testimony of Sandra Miller and the kidnap victim Athena Akins like they don't even exist, where either of those witnesses, standing alone, is

enough to justify a not guilty verdict.

Neither the District Court nor the Michigan Court of Appeals stated the standard it used [*Brecht*, *Chapman*, or some other standard] to find that the outcome of a case this weak, which led to a hung jury at the first trial, could not be affected by the prosecutor telling the jury that the main defense witness was in the hallway laughing about the story she told. It is hard to think of a standard by which this could be viewed as other than prejudicial, given the evidence in the case. The state court and District Court actions were unreasonable and should be reviewed.

We submit that the application of harmless error rules is a question of national importance suitable for United States Supreme Court review, and that this case involves injustice to Mr. Langford, making it more suitable for review.

The failure of the Sixth Circuit to grant a Certificate of Appealability, in the face of a District Court ruling that there were constitutional errors in more than one issue, based strictly on unexplained claims of "overwhelming evidence," is also unreasonable and should be reviewed. The standard announced in *Miller-El v. Cockrel* cannot mean much if even a case like this cannot get a Certificate of Appealability.

QUESTION 3: WHETHER, IN A CASE BASED ON THE WORD OF ONE WITNESS TESTIFYING UNDER AN AGREEMENT WITH THE PROSECUTION, IT WAS CONSTITUTIONAL TO EXCLUDE EVIDENCE OF THE BENEFITS THE WITNESS WOULD GET FROM THE DEAL.

In this issue, the state court found that there was preserved constitutional error [see *Giglio v. United States*, 405 U.S. 150; 92 S.Ct. 763; 31 L.Ed.2d 104 (1972); *People v. Wiese*, 425 Mich. 448 (1986)], of not allowing inquiry into what penalty witness Eugene Childrey was avoiding by his deal with the prosecution. Once again, there was a finding of harmless error, because of the supposed "overwhelming evidence."

The federal court ruled that a person has no right to have the jury know the penalty the witness escapes, while we submit that information is essential to knowing the value of the deal. If someone tells you that product X is for sale for $250, if you do not know how much that product usually costs, you do not know enough to decide whether to be motivated to act.

A witness being paid carfare is not suspected as much as a witness being paid $50,000, even though both are equally paid.

The same thing is true of a sentence. A witness getting a year off his sentence is not the same as the witness getting off a life without parole sentence. In deciding credibility of a witness, the value of the incentive to lie is a fact a reasonable juror would consider, but a juror cannot consider it when the underlying information is concealed.

If Eugene Childrey were not on that witness stand testifying that Langford was not only in on the plot, but was the driver and leader, he would never get out of prison for the rest of his life. That makes the value of the deal of a different kind than a mere reduction in years.

What legitimate interest does it serve to keep this

information from the jury? We submit that the need to keep a jury from knowing what sentences the criminal law imposes is less compelling than the need of jurors to have the information needed to properly evaluate the credibility of witnesses.

The kidnap victim said Petitioner James Langford was not in the van where she and her son were held captive, but Childrey, who admitted to being part of the kidnap of Akins and the murder of Officer Bandy, said Petitioner was in the van, and was giving all the orders. The issue of Childrey's credibility thus was critical to the defense. Without Childrey they did not have a case, the very reason they gave him the deal.

As in Issue II, we submit that the application of harmless error rules is a question of national importance suitable for United States Supreme Court review, and that this case involves injustice to Mr. Langford, making it more suitable for review.

QUESTION 4: WHETHER, IN A HOMICIDE CASE WITH SUBSTANTIAL EVIDENCE OF ACCESSORY AFTER THE FACT, AND MUCH WEAKER EVIDENCE OF INVOLVEMENT IN THE KILLING, IT DENIES DUE PROCESS TO DENY THE DEFENSE REQUEST TO INSTRUCT THE JURY ON THE CRIME OF ACCESSORY AFTER THE FACT.

The trial court rejected a defense request for instruction on the lesser included offense of accessory after the fact, a 5 year felony, M.C.L. 750.505. (T XII, 23, 70-71). The judge

stated: "It cannot be accessory after the fact to murder. It is a legal impossibility. ... Not only is it a legal impossibility, it's a factual impossibility." We submit the refusal of the trial court to instruct on this defense to the charge of murder violated due process of law. Under the existing ruling, no defendant can ever get such an instruction unless the prosecutor chooses to charge it.

Under Michigan law, an accessory after the fact is one who after a crime renders assistance to a criminal, knowing of the criminal's guilt. M.C.L. 750.505; *People v. Lucas*, 402 Mich. 302 (1978). Such a person cannot properly be determined to be an aider and abettor, M.C.L. 767.39, and is not liable as a principal. *People v. Lucas*, supra; *People v. Karst*, 118 Mich. App. 34 (1982).

The federal court took the position that the refusal to instruct on a lesser offense supported by the evidence does not present a federal question.

It is true that in state court, in cases of lesser notoriety, the refusal to instruct on accessory after the fact, where supported by the evidence, has been found to be reversible error. *People v. Lucas*, supra; *People v. Karst*, supra.

However, federal jurisprudence as well has found the refusal to instruct on any lesser offense, where supported by the evidence, to be reversible constitutional error. *Keeble v. United States*, 412 U.S. 205; 93 S.Ct. 1993; 36 L.Ed. 2d 844 (1973); *Ferrazza v. Mintzes*, 735 F.2d 967 (6th Cir. 1985) *Vujosevic v. Rafferty*, 844 F.2d 1023 (3d Cir.1988). The test is whether the jury could rationally find guilt on the lesser offense but not the greater. *United States v. Crutchfield*, 547 F.2d 496, 499 (9th Cir. 1977). See *Schad v. Arizona*, 501

U.S. 624; 111 S. Ct. 2491; 115 L.Ed.2d 555 (1991):

> "As we later explained in *Spaziano v. Florida*, 468 U.S. 447, 455 (1984), "[t]he absence of a lesser included offense instruction increases the risk that the jury will convict . . . simply to avoid setting the defendant free. . . . The goal of the *Beck* rule, in other words, is to eliminate the distortion of the factfinding process that is created when the jury is forced into an all-or nothing choice"

There was evidence that Petitioner assisted Montez Moore, also convicted in the shootings, to flee and hide in Erie, Pennsylvania after the shootings. These actions would plainly provide a basis for convicting Petitioner of accessory after the fact.

The failure to instruct was a trial error under *Brecht v. Abrahamson*, 507 U.S. 609; 113 S.Ct. 1710; 123 L.Ed.2d 353 (1993). We submit that the error "had a substantial and injurious effect or influence in determining the jury's verdict" as defined in *Brecht*. As the Court held in *Schad v. Arizona*: "[t]he absence of a lesser included offense instruction increases the risk that the jury will convict . . . simply to avoid setting the defendant free. . . . The goal of the *Beck* rule, in other words, is to eliminate the distortion of the factfinding process that is created when the jury is forced into an all-or nothing choice".

In this case, a rational jury could find that Petitioner interfered with the police in capturing Montez Moore. If that

were their only finding against Petitioner, they would still have to convict him of first degree murder under the erroneous instructions given.

The Michigan Court of Appeals ruled that even if supported by the evidence, a defendant is barred by state law by having a jury instruction on a "cognate lesser offense." Even though we submit that ruling to be wrong under state law, we submit that there is a federal interest involved.

The District Court unfortunately ruled:

> "Where a state court has reviewed a habeas petitioner's request for a lesser included offense instruction and concludes that it was not warranted by the evidence presented at trial, that conclusion is 'axiomatically correct, as a matter of state law.'" [emphasis supplied]

This mischaracterized the state court ruling. The state court did not say there was insufficient evidence to convict Petitioner of accessory after the fact, but said simply that because he was not charged with it, he could not get an instruction on a cognate lesser offense. Thus, the entire basis for the District Court ruling was based on a misperception of the state court ruling, making the denial of Certificate of Appealability even more unreasonable. *Miller-El v. Cockrell*, supra.

Although *Schad v. Arizona* was a death penalty case, the case was decided on the basis of fundamental fairness, and that should apply whether the death penalty is involved or not. Petitioner Langford had a genuine and substantial liberty interest in being convicted only of a 5 year offense

rather than a mandatory life in prison offense, and this was taken from him.

QUESTION 5: WHERE THE DEFENDANT WISHES TO TESTIFY, WHETHER "WAIVER BY INACTION" OF THE PERSONAL RIGHT TO TESTIFY REQUIRES THAT SOMEONE INFORM THE DEFENDANT THAT THIS IS THE TIME TO SPEAK UP IF HE DOES WISH TO TESTIFY.

Waiver of a federal constitutional right cannot be implied from a silent record. *Johnson v. Zerbst*, 304 U.S. 458; 58 S.Ct. 1019; 82 L Ed 1461 (1938). This record contains no waiver by Petitioner of the constitutional right to testify. In *Rock v. Arkansas*, 483 U.S. 44; 107 S.Ct. 2704; 97 L.Ed.2d 37 (1987), the Supreme Court held that the right to testify is a fundamental right, so fundamental that it cannot be waived by counsel alone.

The circumstances of this case are special, in that there was no announcement in court that Petitioner would not be testifying, hence he had no notice that he would not testify.

Moreover, the trial attorney filed an affidavit that Petitioner Langford did state he wanted to testify, and that the attorney inadvertently overrode that decision. No evidentiary hearing was held.

In *People v. Curtis*, 681 P.2d 504 (Colo, 1984), the Colorado Supreme Court ruled that a trial court has a duty to ascertain in open court whether the accused chooses to waive his or her right to testify. Indeed, it would appear impossible to comply with *Johnson v. Zerbst* without making such an

inquiry. It is therefore not surprising that the federal circuit courts fully agree that a waiver of the right to testify cannot be gleaned from a silent record. *United States v. Teague*, 908 F.2d 752, 754 (11th Cir. 1990); *Alicea v. Gannon*, 675 F.2d 913, 923 (7th Cir. 1982); *United States v. Curtis*, 742 F.2d 1070, 1076 (7th Cir. 1984). In *United States v. Teague*, supra, the Court held:

> "The absence of an on the record objection by the defendant himself after defense counsel rested its case without calling him to the stand is of little, if any, probative value in this determination. It would be anomalous to consider the right to counsel to be of fundamental importance because of the common lack of understanding of the trial process by defendants, and to require a defendant to rely on his counsel to be his sole spokesperson in the courtroom, while at the same time holding that by failing to speak out at the proper time a defendant has made a knowing, voluntary, and intelligent waiver of a personal right of fundamental importance such as the right to testify."

The usual rule is that the defendant is to keep his mouth shut and not interrupt proceedings, yet, the rule followed by the District Court is that if the defendant behaves himself he loses the right to testify. Further, the attorney did not declare to the trial court that Petitioner did not want to testify, meaning that there was no direct false statement for Petitioner to respond to. If a rule overruling the United States Supreme Court authority is to be adopted, requiring the defendant to "alert the trial court" that he wants to testify,

the trial court must advise the defendant that he has the right to interrupt the proceedings, and when that interruption must take place. Where the "waiver" is accomplished by the attorney not even saying that the defendant has chosen not to testify, to require the defendant to understand that his right to testify was just then implicitly taken away is to require too much. *United States v. Teague*, supra.

Here, the decision not to testify was made by the attorney, and not by the client. The Court did not determine whether Mr. Langford wanted to testify. The Court thereby improperly allowed defense counsel to make a decision which, under the constitution, belongs exclusively to the defendant.

We submit the lower court cases relied on by the District Court cannot properly overrule United States Supreme Court authority.

We submit that United States Supreme Court guidance on this recurring question of widespread importance is called for. What constitutes a waiver of the right to testify? What procedural safeguards are required? Can silence alone be counted as a waiver? Can silence alone be counted as a waiver where no one says "the defendant is not testifying" so the defendant knows there is something for him to respond to? The ruling in this case, that the fact of not testifying is itself a waiver, is thoroughly at odds with United States Supreme Court authority on waivers of constitutional rights, and strips from all defendants the right to personally decide whether or not to testify, a right recognized in *Rock v. Arkansas* but otherwise not recognized or followed by most lower courts.

QUESTION 7: WHETHER FAILURES TO OBJECT TO ERRORS, AND FAILURE TO EXPOSE A MAJOR CHANGE IN TESTIMONY BETWEEN THE FIRST AND SECOND TRIALS, AMOUNTED TO INEFFECTIVE ASSISTANCE OF COUNSEL.

QUESTION 8: WHETHER THE STATE AND FEDERAL COURTS IMPROPERLY REFUSED TO HOLD AN EVIDENTIARY HEARING ON PETITIONER'S CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL AND DENIAL OF RIGHT TO TESTIFY.

Petitioner in state and federal court raised issues of ineffective assistance of counsel and denial of right to testify. Evidentiary hearing was requested, and denied. Because the facts supporting portions of these issues do not appear in the record, and because Petitioner did request an evidentiary hearing, the federal court should have conducted an evidentiary hearing. *Michael Williams v. Taylor*, 529 U.S. 420; 120 S.Ct. 1479; 146 L.Ed.2d 435 (2000).

In addition to failures to object by defense counsel, defense counsel also overlooked a critical change in testimony. This case involved a kidnapping, leading to a murder and an assault with intent to murder. There was no rape.

In the first trial (with a hung jury) witness Antonio Barnett testified that when the news report came on TV, Petitioner said he did not kidnap anyone. However, in the second trial (leading to conviction), Barnett testified that Petitioner said he did not rape anyone. Therefore, the

extremely positive testimony from Barnett at trial 1 turned into worthless testimony (for the defense) at trial 2. Counsel's failure to confront Barnett with the change in testimony was clearly ineffective assistance of counsel. However, until we get an evidentiary hearing, requested from and denied by every reviewing court, the court will have a difficult time finding actual ineffective assistance of counsel, meaning that an evidentiary hearing should be held.

CONCLUSION

Petitioner James Langford respectfully submits that for the reasons stated above, this Court should grant Certiorari and Habeas Corpus relief. On questions 5, 6, and 7, the Court should remand to the District Court for an evidentiary hearing. On the remaining issues, this Court should grant a new trial.

Respectfully submitted,

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Dated: March 22, 2007

No. 06-2075

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES LANGFORD, Petitioner-Appellant,	)	
v.	)	ORDER
KURT JONES, Warden, Respondent-Appellee	)	

James Langford, a Michigan prisoner represented by counsel moves for a certificate of appealability and appeals a district court judgment denying his petition for a writ of habeas corpus filed under 28 U.S.C. § 2254.

Langford was convicted of one count of first-degree felony murder, four counts of assault with intent to commit murder, and one count of possession of a firearm in the commission of a felony. He was sentenced to concurrent prison terms of life imprisonment without parole for the felony murder conviction, sixty to ninety years for the first assault convictions, forty to sixty years for the second assault conviction, and thirty to sixty years for each of the two remaining assault convictions, to be served consecutive to a two-years term for the felony-firearm conviction. Langford's conviction was affirmed on appeal.

In his habeas petition, Langford raises the following claims:

I. Petitioner was prejudiced by testimonial assertions by the prosecutor in violation of the right of confrontation and other rights.

II. The trial court wrongly permitted the prosecutor to introduce prior consistent statements of a prosecution witness, made after the existence of a motive to lie.

II. The trial court wrongly excluded evidence about the benefits witness Childrey was getting from his deal with the

prosecution.

IV. The trial court wrongly permitted the prosecutor to introduce hearsay, a document allegedly containing the prior statements of a prosecution witness.

V. The trial court wrongly refused to rule on a motion to suppress a statement on the ground he had no authority to rule.

VI. Petitioner was prejudiced by improper prosecutor argument.

VII. The trial court denied petitioner, a fair trial by refusing to instruct the jury on accessory after the fact, and by refusing to instruct the jury that aid and assistance given after the crime does not constitute aiding and abetting.

VIII. Petitioner was wrongfully deprived of his right to testify.

IX. Petitioner was prejudiced by ineffective assistance of counsel.

The district court denied the habeas petition on the merits.

To obtain a certificate of appealability, a petitioner "must make a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A petitioner satisfies the substantial showing threshold by demonstrating "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v McDaniel*, 529 U.S. 473, 484 (2000).

The court has carefully reviewed Langford's motion, the district court's disposition, and the record on appeal. Nothing in the facts, the record on appeal, or Langford's filing raises an issue which meets the standard for the grant of a certificate of appealability. For substantially the reasons set forth in the district court's opinions, the court concludes that no reasonable jurist would debate the correctness of the district court's judgment denying the petition for habeas corpus.

Accordingly, the court declines to issue a certificate of appealability.

ENTERED BY ORDER OF THE COURT

/S/ LEONARD GREEN CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JAMES LANGFORD,

Petitioner, CASE NO. 04-CV-74335-DT

v. HON. BERNARD A. FRIEDMAN
CHIEF UNITED STATES DISTRICT JUDGE

KURT JONES,

Respondent,

OPINION AND ORDER DENYING A CERTIFICATE OF APPEALABILITY

On July 7, 2006, this Court issued an opinion and order denying petitioner's application for writ of habeas corpus brought pursuant to 28 U.S.C. § 2254. The Court also sua *sponte* denied petitioner a certificate of appealability on the ground that petitioner failed to make a substantial showing of the denial of a constitutional right with respect to his claims. This matter has now been remanded by the United States Court of Appeals for the Sixth Circuit "for the sole purpose of determining whether to grant or deny a certificate of appealability." *Langford v. Jones,* U.S.C.A. No. 06-2075 (6'" Cir. October 3, 2006). For the reasons stated below, the Court will again deny petitioner a certificate of appealability.

A. Standard of Review

28 U.S.C. § 2253(c)(1)(A) and F.R.A.P. 22(b) state that an appeal from the

district court's denial of a writ of habeas corpus may riot be taken unless a certificate of appealability (COA) is issued either by a circuit court or district court judge. If an appeal is taken by an applicant for a writ of habeas corpus, the district court judge shall either issue a certificate of appealability or state the reasons why a certificate of appealability shall not issue. F.R.A.P. 22(b).

In order to obtain a certificate of appealability, a prisoner must make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). To demonstrate this denial, the applicant is required to show that reasonable jurists could debate whether, or agree that, the petition should have been resolved in a different manner, or that the issues presented were adequate to deserve encouragement to proceed further. *Slack v. McDaniel,* 529 U.S. 473, 483-84 (2000). When a district court rejects a habeas petitioner's constitutional claims on the merits, the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims to be debatable or wrong. *Id.*

B. The individual claims.

As mentioned above, this Court denied petitioner a certificate of appealability at the time that it denied the petition for writ of habeas corpus. *Langford v. Jones,* U.S.D.C. No. 04-CV-74335-DT, * 20-21 (E.D. Mich. July 7, 2006). A federal district court may grant or deny a certificate of appealability when the court issues a ruling on the habeas petition. Castro *v. United States,*

310 F. 3d 900, 901 (6th dr. 2002). A district court therefore has the power to deny a certificate of appealability sua sponte. See *Dell v. Straub,* 194 F. Supp. 2d 629, 658 (E.D. Mich. 2002). This Court also indicated in its judgment that it was denying a certificate of appealability to petitioner. [Court Dkt. Entry # 35]. It is therefore unclear why this matter has been remanded to this Court, in light of the fact that the Court has already denied petitioner a certificate of appealability. However, to avoid any further confusion, the Court will specifically deny a certificate of appealability with respect to each of petitioner's claims.

I. Claims # 1 and # 6. The prosecutorial misconduct claims.

In his first and sixth claims, petitioner contended that he had been deprived of a fair trial because of various instances of prosecutorial misconduct. The Court rejected petitioner's prosecutorial misconduct claims, finding that petitioner had failed to show that the prosecutor's conduct and remarks denied him a fundamentally fair trial. A certificate of appealability is not warranted where a petitioner fails to show that a prosecutor's statements rose to the level of a substantial showing of the denial of a constitutional right. See *Conwin v. Johnson,* 150 F.3d 467, 477 (5'" Cir. 1998). Petitioner is therefore not entitled to a certificate of appealability on his first and sixth claims.

II. Claims # 2, 4, and # 5. The state law claims.

In his second and fourth claims, petitioner alleged that the trial court erred in admitting the prior consistent statements of prosecution witness Eugene

Childrey into evidence. In his fifth claim, petitioner contended that the trial court erred in refusing to reconsider the ruling that a previous trial judge had made regarding a motion to suppress evidence. The Court rejected these three claims because they involved matters of state law that are non-cognizable in federal habeas review. Petitioner is not entitled to a certificate of appealability on these claims, because the issues are not constitutionally cognizable. See e.g. *Knowles v. Hines,* 9 Fed. Appx. 890, 892 (10'" Cir. 2001). Because a federal habeas court has no jurisdiction to grant relief on a violation of state law, the Court declines to grant a certificate of appealability on petitioner's second, fourth, or fifth claims. See *Stringer v. Williams,* 161 F. 3d 259, 261 (51" Cir. 1998).

III. Claim # 3. The Confrontation Clause claim.

Petitioner next contended that his right to confrontation was violated when his counsel was precluded from cross-examining Eugene Childrey about the maximum sentence that he avoided by entering into the plea bargain with the prosecutor, in exchange for his testimony against petitioner. Petitioner's Confrontation Clause rights were not violated by the trial court's refusal to allow counsel to question Childrey about the specific penalties that he would have received had he not cooperated, because counsel was able to question Childrey about the fact that he had received a plea bargain in exchange for his testimony, the fact that he faced severe penalties for failing to cooperate, and the fact that he was receiving a lesser sentence for cooperating with the prosecution.

Courts have issued a certificate of appealability on Confrontation Clause claims where the issue presented a "close question." See *Bui v. DiPaolo,* 985 F. Supp. 219, 229 (D. Mass. 1997). Petitioner is not entitled to a certificate of appealability on his third claim, because his Confrontation Clause claim did not present a "close question" for this Court.

IV. Claim # 7. The jury instruction claims.

Petitioner next claimed that the trial court erred in refusing to instruct the jury on the lesser included offense of being an accessory after the fact and further claimed that the trial court gave an erroneous aiding and abetting instruction. The Court rejected the first part of petitioner's claim, because the Michigan Court of Appeals determined that petitioner was not entitled under Michigan law to an instruction on accessory after the fact. Because the Michigan Court of Appeals determined that petitioner was not entitled under state law to such an instruction, he is not entitled to a certificate of appealability on this claim. See e.g. *Leech v.* Mines, 151 Fed. Appx. 710, 712 (10th Cir. 2005). The Michigan Court of Appeals further concluded that the aiding and abetting instruction was an accurate reflection of state law. Because the aiding and abetting instruction is an accurate reflection of state law, petitioner is not entitled to a certificate of appealability on this portion of his claim. See *Johnson v. Beck,* 150 Fed. Appx. 807, 810 (10'" Cir. 2005).

V. Claim # 8. The right to testify claim.

In his eighth claim, petitioner contended that the trial court erred in failing to ascertain whether petitioner wanted to testify or whether he wished to waive that right. In rejecting this claim, the Court noted that when a tactical decision is made by an attorney that a defendant should not testify, the defendant's assent is presumed. *Gonzales v. Elo,* 233 F. 3d 348, 357 (6* Cir. 2000). Waiver of the right to testify may be inferred from a defendant's conduct. Waiver is presumed f rom the defendant's failure to testify or notify the trial court of the desire to do so. *United States v. Webber,* 208 F. 3d 545, 551 (6"' Cir. 2000). In the present case, petitioner did not alert the trial court at the time of trial that he wanted to testify. Thus, his failure to do so constituted a waiver of this right. *Id.* Because there was noting in the record to suggest that petitioner disagreed with counsel's advice that he should not testify, petitioner failed to overcome the presumption that he willingly agreed to counsel's advice not to testify or that his counsel rendered ineffective assistance of counsel. *Gonzales,* 233 F. 3d at 357.

In the absence of some indication that petitioner's failure to testify at trial was the result of coercion, rather than advice from his counsel that to testify would be damaging to his case, petitioner is not entitled to a certificate of appealability his claim that his counsel prevented him from exercising his right to testify. See *Paradise v. DuBois,* 188 F. Supp. 2d 4, 9-10 (D. Mass. 2001).

VI. Claim # 9. The ineffective assistance of counsel claims.

In his ninth claim, petitioner alleged that he was denied the effective assistance of trial counsel.

A habeas petitioner's ineffective assistance of counsel claim must make a substantial showing of the denial of a constitutional right so as to justify the issuance of a certificate of appealability. See *Skaggs v. Parker,* 235 F.3d 261, 266 (6th Cir. 2000). For the reasons stated by the Court in much greater detail in the order denying the petition for writ of habeas corpus, petitioner has failed to make a substantial showing that he was denied the effective assistance of counsel. A certificate of appealability shall not issue on these claims.

C. ORDER

For the reasons stated both in the Court's original opinion and order denying habeas relief, as well as in this opinion, the Court will DENY petitioner a certificate of appealability because he has failed to make a substantial showing of the denial of a federal constitutional right with respect to any of his nine claims. *Dell,* 194F.Supp.2d at 659.

s/Bernard A. Friedman
HON. BERNARD A. FRIEDMAN
CHIEF UNITED STATES DISTRICT JUDGE

DATED: October 24, 2006

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JAMES LANGFORD,

Petitioner, CASE NO. 04-CV-74335-DT

v. HON. BERNARD A. FRIEDMAN
CHIEF UNITED STATES DISTRICT JUDGE

KURT JONES,

Respondent,

OPINION AND ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

James Langford, ("Petitioner"), presently confined at the Riverside Correctional Facility in lonia, Michigan, seeks the issuance of a writ of habeas corpus pursuant to 28 U.S.C. § 2254. In his application, filed by attorney James Sterling Lawrence, petitioner challenges his conviction and sentence on one count of first-degree felony murder, M.C.L.A. 750.316(1)(b); four counts of assault with intent to commit murder, M.C.L.A. 750.83; and one count of possession of a firearm in the commission of a felony, M.C.L.A. 750.227b. For the reasons stated below, the application for writ of habeas corpus is DENIED.

I. **Background**

Petitioner was convicted of the above charges following a jury trial in the Wayne County Circuit Court. Petitioner's counsel has provided a detailed statement of facts in his petition for writ of habeas corpus.' Respondent has

1 See Brief in Support of Petition for Writ of Habeas Corpus, pp. 2-8 [This Court's Dkt Entry # 1].

likewise provided a detailed factual summary of the case, which does not essentially conflict with the petitioner's statement of facts.2 The Court will therefore accept the factual allegations contained within the habeas petition insofar as they are consistent with the record, because the respondent has not disputed them. See *Dickens v. Jones,* 203 F. Supp. 2d 354, 360 (E.D. Mich. 2002) ("When a state's return to a habeas corpus petition fails to dispute the factual allegations contained within the habeas petition, it essentially admits these allegations"). Because the facts of this case have been repeated numerous times, they need not be repeated here in their entirety. Therefore, only a brief overview of the facts is required. See *Nevers v. Killinger.* 990 F. Supp. 844, 847 (E.D. Mich. 1997).

Petitioner's conviction arose out of the kidnapping of Athena Akjns and her son Leroy Akins in Detroit, Michigan on December 5,1998, by petitioner and three co-defendants. The evidence at trial established that petitioner was the driver of this van. During an ensuing police chase of the van that was used during the kidnapping, the men inside the van fired gunshots at the police. Detroit Police Officer Shawn Bandy was killed and another officer was injured.

Petitioner's conviction was affirmed. *People v. Langford,* 235163 (Mich. Ct. App. July 1, 2003); *Iv. den.* 469 Mich. 988; 673 N.W. 2d 760 (2003).

2See Respondent's Answer to Petition for Writ of Habeas Corpus, pp. 35-12 (This Court's Dkt Entry* 32].

Petitioner has now filed an application for writ of habeas corpus, in which he seeks habeas relief on the following grounds:

I. Petitioner was prejudiced by testimonial assertions by the prosecutor in violation of the right of confrontation and other rights.

II.The trial court wrongly permitted the prosecutor to introduce prior consistent statements of a prosecution witness, made after the existence of a motive to lie.,

III. The trial court wrongly excluded evidence about the benefits witness Childrey was getting from his deal with the prosecution.

IV. The trial court wrongly permitted the prosecutor to introduce hearsay, a document allegedly containing the prior statements of a prosecution witness.

V. The trial court wrongly refused to rule on a motion to suppress a statement on the ground he had no authority to rule.

VI. Petitioner was prejudiced by improper prosecutor argument.

VII. The trial court denied petitioner a fair trial by refusing to instruct the jury on accessory after the fact, and by refusing to instruct the jury that aid and assistance (sic).

VIII. Petitioner was wrongfully deprived of his right to testify.

IX. Petitioner was prejudiced by ineffective assistance of counsel.

II. Standard of Review

28 U.S.C. § 2254(d) imposes the following standard of review for habeas cases:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim- (1) resulted in a decision that was contrary to, or

involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

A decision of a state court is "contrary to" clearly established federal law if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). An "unreasonable application" occurs when "a state court decision unreasonably applies the law of [the Supreme Court] to the facts of a prisoner's case." *Id.* at 409. A federal habeas court may not "issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Id.* at 410-11.

III. Discussion

A. Claims # 1 and # 6. The prosecutorial misconduct claims. The Court will consolidate petitioner's first and sixth prosecutorial misconduct claims for purposes of judicial clarity.3

3Respondent contends that the majority of petitioner's prosecutorial misconduct claims are procedurally defaulted. Petitioner has raised a number of arguments in which he contends that the claims are not defaulted or that any default should be excused. Because "the procedural default issue raises more questions than the case on the merits", this Court will assume, for the sake of resolving the claims, that there is no procedural default by petitioner and will decide the merits of the claims, *Fatkiewicz v. Grayson,* 271 F. Supp. 2d 942, 948 (E.D, Mich. 2003).

When a petitioner seeking habeas relief makes a claim of prosecutorial misconduct, the reviewing court must consider that the touchstone of due process is the fairness of the trial, not the culpability of the prosecutor. On habeas review, a court's role is to determine whether the conduct was so egregious as to render the entire trial fundamentally unfair. Serra *v. Michigan Department of Corrections,* 4 F. 3d 1348,1355-56 (6"' Cir. 1993). In evaluating prosecutorial misconduct in a habeas case, consideration should be given to the degree to which the challenged remarks had a tendency to mislead the jury and to prejudice the accused, whether they were isolated or extensive, whether they were deliberately or accidentally placed before the jury, and, except in the sentencing phase of a capital murder case, the strength of the competent proof against the accused. *Id.* Thus, in order to prevail on a claim of prosecutorial misconduct, the alleged misconduct must so infect the trial with unfairness as to make the petitioner's resulting conviction a denial of due process. *Robertson v. Abramajtys,* 144 F. Supp. 2d 829, 843 (E.D. Mich. 2001).

Petitioner first contends that the prosecutor acted as a witness by questioning a defense witness, Ishmael Muhammad, about whether another defense witness, Sandra Miller, had been laughing outside of the courtroom after testifying on petitioner's behalf. Muhammad replied that it was a lie that Miller had been laughing about the story that she had told in court, but the prosecutor argued in closing argument that Miller had been giggling outside of the

courtroom in order to impugn her credibility.

It is improper for a prosecutor during closing arguments to bring to the jury any purported facts which have not been introduced into evidence and which are prejudicial. *Byrd v.* Coffins, 209 F. 3d 486, 535 *(6s'* Cir. 2000). In this case, however, petitioner is not entitled to habeas relief on his claim that the prosecutor made remarks that were based upon purported facts that were not introduced into evidence, because the remarks were isolated and the evidence against petitioner in this case was strong. See Mac/as *v. Makowski,* 291 F. 3d 447, 453-54 (6"' Cir. 2002); *Byrd,* 209 F. 3d at 536.

In his sixth claim, petitioner first contends that the prosecutor committed misconduct by telling the jury in his opening statement that he was "ecstatic" about the fact that prosecution witness Eugene Childrey would be going to prison as part of a deal that called for him to testify against petitioner. A defense objection to this remark was sustained.

Petitioner has failed to offer any reasons as to why these remarks were a violation of due process. Conclusory allegations of prosecutorial misconduct fail to state a claim upon which habeas relief can be granted. See *Johnson v. Renico,* 314 F. Supp. 2d 700, 710 (E.D. Mich. 2004). However, even if the prosecutor's comments in his opening statement about being ecstatic about Childrey going to prison were improper, they did not affect the fairness of petitioner's trial, in light of the isolated nature of the remark, the fact that there

was overwhelming evidence against petitioner, and the trial court's instruction to the jury that the lawyers' arguments and statements were not evidence. See *United States v. Monday,* 8 Fed. Appx. 394, 401-02 (6'" Cir. 2001).

Petitioner next claims that the prosecutor improperly invoked sympathy for Officer Bandy, by eliciting testimony that Officer Bandy's father was himself a police officer and by later arguing that Officer Bandy cried out for justice from the grave. Even if the prosecutor's appeals to the jury's emotions or sympathies was improper, this would be insufficient to render the trial fundamentally unfair, since it was likely that the nature of the crime itself would have produced juror sympathy even before the prosecutor made any of these comments. See *Millenderv. Adams,* 187 F. Supp. 2d 852, 875-76 (E.D. Mich. 2002). This portion of petitioner's claim would also be defeated by the fact that the trial court instructed the jury that they were not to let sympathy or prejudice influence their decision. *Id.* Likewise, the prosecutor's argument that Officer Bandy sought justice from the grave did not render petitioner's trial unfair, in light of the trial court's instruction to the jury that counsels' arguments were not evidence, as well as the overwhelming evidence of guilt in this case. See Lyons *v. Lee,* 203 F. Supp. 2d 512, 551-53 (M.D.N.C. 2002).

Petitioner next contends that during the cross-examination of Agent Brumley, the prosecutor improperly attempted to elicit questions from him about the reasons for petitioner failing to offer Brumley specific details about the

murder or kidnapping in Detroit, after petitioner's arrest in Erie, Pennsylvania. Petitioner claims that the prosecutor's questions called for speculation. In the present case, even if the prosecutor was wrong to question Brumley about petitioner's reasons for not discussing the details of the crime with him, given the trial court's instruction to the jury that a lawyer's questions were not evidence, the prosecutor's questions were not so serious so as to have created substantial prejudice in the minds of the jurors as to rise to the level of a due process violation. See *Lundy v. Campbell,* 888 F. 2d 467,477-78 (6'" Cir. 1989).

Petitioner next contends that the prosecutor committed misconduct by arguing that justice required a verdict of guilty. Any comments by the prosecutor that finding petitioner guilty was the only way that justice could be served did not deny petitioner a fair trial, in light of the overwhelming evidence against him, coupled with the trial court's instructions that the lawyers' arguments were not evidence and that the jurors should not be swayed by sympathy or prejudice. See *DeShields v. Snyder,* 829 F. Supp. 676, 683-84 (D.Del. 1993).

Petitioner next claims that the prosecutor denigrated defense counsel in closing argument, by accusing defense counsel of deception and trickery. It is improper for an attorney to make "unfounded and inflammatory attacks" on opposing counsel. *United States v. Young,* 470 U.S. 1, 9 (1985). However, although an attorney must not be permitted to make unfounded and inflammatory attacks on an opposing advocate, a prosecutor's statements in

closing argument regarding defense counsel must be viewed in context. *United States v. Catlett*, 97 F. 3d 565, 572 (D.C. Cir. 1996). Although prosecutorial attacks on the credibility or motives of defense counsel are not permitted, the prosecutor has the right to comment on a defense counsel's argument during summation. *Mickens v. United States,* 53 F. Supp. 2d 326, 332 (E.D.N.Y. 1999).

In the present case, the Michigan Court of Appeals determined that when viewed in context, the prosecutor's remarks were made in response to defense counsel's recollection and interpretation of the evidence. The Michigan Court of Appeals concluded that in light of their responsive nature, the prosecutor's remarks were not improper. *People v. Langford,* Slip. Op. at * 2.

In the present case, the prosecutor's comments that defense counsel engaged in tricks did not deprive petitioner of a fair trial, in light of the fact that the comments were in direct response to defense counsel's arguments and assertions. *Mickens,* 53 F. Supp. 2d at 332-33. Moreover, in light of the overwhelming evidence against petitioner in this case, as well as the trial court's instructions that the attorneys' arguments were not evidence and that the jurors should base their verdict solely on the evidence, the prosecutor's remarks about defense counsel did not prejudice petitioner so as to entitle him to habeas relief. See *Rodriguez v. Peters,* 63 F. 3d 546, 560 (71" Cir. 1995).

Petitioner finally claims that the prosecutor engaged in an improper "civic duty" argument by arguing that a conviction was needed to "avoid compounding

the tragedy." With regards to civic or societal duty arguments, the Sixth Circuit has rioted that, "[u]hless calculated to incite the passions and prejudices of the jurors, appeals to the jury to act as the community conscience are not *per se* impermissible." *Byrd,* 209 F. 3d at 539 *(quoting United States v. Solivan,* 937 F. 2d 1146, 1151 (6'" Cir.1991)). In this case, the prosecutor's "less than-pointed-remarks" did not rise to the level of remarks designed to incite prejudice in a jury, thus defeating petitioner's "civic duty" argument claim. See *Puetas v. Overton,* 168 Fed. Appx. 689, 701 (6'" Cir. 2006). Petitioner's civic duty argument claim would also be defeated by the fact that the trial court instructed the jury that they were not to let sympathy or prejudice influence their decision. *Cameron v. Pitcher,* 2001 WL 85893, * 10 (E.D. Mich. January 4, 2001). Finally, in light of the overwhelming evidence of guilt in this case, any appeal by the prosecutor to the community conscience was harmless error. See *United States v. Roberts,* 986 F. 2d 1026, 1032(6'"Cir. 1993).

Petitioner has failed to show that the prosecutor's comments and remarks deprived him of a fair trial. Petitioner's first and sixth claims does not entitle him to habeas relief. Because petitioner has failed to show that he was deprived of a fair trial because of prosecutorial misconduct, that portion of petitioner's ninth claim that counsel was ineffective for failing to object to the prosecutorial misconduct raised in petitioner's first claim must also be rejected. Mi/tender, 187 F.Supp.2d at 876.

B. Claims *It 1* and # 4. The prior consistent statements claims.

In his second and fourth claims, petitioner alleges that the trial court erred in admitting the prior consistent statements of prosecution witness Eugene Childrey into evidence, contending that they were inadmissible pursuant to M.R.E. 801(d)(1)B) because they were made to law enforcement officials after Childrey had a motive to fabricate a story against petitioner.

The admission of a prior consistent statement when the declarant is available for cross-examination at trial, as was the case here, is not a question that rises to the level of a constitutional violation for purposes of habeas corpus relief. *United States ex.* re/. *Gonzalez v. DeTella,* 918 F. Supp. 1214,1222 (N.D. III. 1996)(c/ting to *California v. Green,* 399 U.S. 149,157 (1970). Petitioner's claim about the admission of prior consistent statements that Childrey made to the police involves at best an error of state law that is not cognizable in federal habeas review. *Regan v. Hoffner,* 209 F. Supp. 2d 703, 715 (E.D. Mich. 2002). Because Childrey was subject to cross-examination at petitioner's trial, the admission of his prior consistent statements does not present any Confrontation Clause problems. *Id.*

Petitioner's reliance on *Tome v. United States,* 513 U.S. 150 (1995) is misplaced, because the holding in *Tome* involved the application of federal rules of evidence, not the federal constitution. "[A] state court does not violate federal law merely because it does not follow federal rules of process." *Scruggs v.*

Williams, 903 F. 2d 1430,1434 (11'" Cir. 1990). The U.S. Supreme Court's "authority to promulgate rules of procedure Is limited to proceedings in federal court." *Id.* (citing to 18 U.S.C. §§ 3771, 3772). A habeas petitioner cannot rely upon a U.S. Supreme Court case whose holding deals with the applicability of the Federal Rules of Evidence to obtain habeas relief. See *Norris v. Schotten,* 146 F. 3d 314, 335 (6'" Cir. 1998). Petitioner is therefore not entitled to habeas relief on his second and fourth claims.

C. Claim # *3.* The Confrontation Clause claim.

Petitioner next contends that his right to confrontation was violated when his counsel was precluded from cross-examining Eugene Childrey about the maximum sentence that he avoided by entering into the plea bargain with the prosecutor, which called for his testimony against petitioner.

The Michigan Court of Appeals agreed that the trial court erred in precluding this testimony, but found the error to be harmless, in light of the fact that Childrey was cross-examined at length about his involvment in the crimes and his motivation for testifying. In addition, defense counsel was successful in getting Childrey to admit that if he had not cooperated with the prosecution, he faced a substantial sentence, "more than [he] could ever do." Moreover, during the cross-examination of another witness, defense counsel mentioned that a charge of accessory after the fact carried a penalty of "life in prison." The Michigan Court of Appeals concluded that the jury had a sufficient basis to

evaluate Childrey's credibility and his motives for testifying. *People v. Langford,* Slip. Op. at * 3-4.

The Confrontation Clause guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, that the defendant might wish. *United States v. Owens,* 484 U.S. 554, 559 (1988). The Confrontation Clause of the Sixth Amendment does not prevent a trial judge from imposing limits on a defense counsel's inquiry into potential bias of a prosecution witness; to the contrary, trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, a witness' safety, or interrogation that Is repetitive or only marginally relevant. *Delaware v. Van Arsdall,* 475 U.S. 673, 679 (1986). Where it is merely the extent of cross-examination into a certain area that is limited, the trial judge retains much wider latitude of discretion, although that discretion may still be abused. *Dorsey v. Parks,* 872 F. 2d 163,166 (6"' Cir. 1989); *Dell v. Straub,* 194 F. Supp. 2d 629, 644 (E.D. Mich. 2002).

A defendant who is permitted to cross-examine a cooperating witness regarding the details of that witness's plea bargain, as was the case here, does not also have a categorical right under the Confrontation Clause to inquire into the penalty the cooperating witness would otherwise have received. See *United*

States v. Mussare, 405 F. 3d 161,170 (3rd Cir. 2005); cert. *den.* 126 S. Ct. 1432 (2006). In the present case, petitioner's Confrontation Clause rights were not violated by the trial court's refusal to allow counsel to question Childrey about the specific penalties that he would have received had he not cooperated, in light of the fact that counsel was able to question Childrey about the fact that he had received a plea bargain in exchange for his testimony, the fact that he faced severe penalties for failing to cooperate, and the fact that he was receiving a lesser sentence for cooperating with the prosecution. See *United States v. Cropp,* 127 F. 3d 327, 358-59 (4* Cir. 1997). Because of the extensive testimony permitted regarding Childrey's plea bargain, "the actual number of years in jail" that he would otherwise have faced was not likely to have altered the jury's impression of his motive for testifying. *Mussare,* 405 F. 3d at 170. Petitioner is not entitled to habeas relief on his third claim.

D. Claim # 5. The trial court's refusal to reconsider the motion to suppress.

Petitioner next contends that the trial court erred in refusing to reconsider the ruling that a previous trial judge had made concerning the admissibility of a statement which petitioner had made to a Detroit Police Department detective over the telephone while he was barricaded in a home in Erie, Pennsylvania.

Violations of state law and procedure which do not infringe specific federal constitutional protections are not cognizable claims under Section 2254. *Estelle*

v. McGuire, 502 U.S. 62, 67-68 (1991). A habeas petitioner's claim that a state court erred in applying state law or procedure when deciding whether or not to grant certain motions is non-cognizable on federal habeas review, because no federal constitutional issue is involved. See *Durham v. Paderick,* 368 F. Supp. 342, 344-45 (W.D. Va. 1973). Petitioner is not entitled to habeas relief on his fifth claim.

E. Claim # 7. The jury instruction claims.

Petitioner next claims that the trial court erred in refusing to instruct the jury on the lesser included offense of being an accessory after the fact. The Michigan Court of Appeals rejected this claim, finding that under Michigan law, being an accessory after the fact is not a cognate offense of murder. *People v. Langford,* Slip. Op. at * 6.

The United States Supreme Court has declined to determine whether the Due Process Clause requires that a state trial court instruct a jury on a lesser included offense in a non-capital case. See *Adams v. Smith, 280* F. Supp. 2d 704, 717 (E.D. Mich. 2003)(citing to *Beck v. Alabama,* 447 U.S. 625, 638, n. 4 (1980)). Thus, a state trial court's failure to give the jury an instruction on a lesser included offense in a non-capital case is not contrary to, or an unreasonable application of, clearly established federal law as required for federal habeas relief. *Id. Beck* has been interpreted by the Sixth Circuit to mean that "the [federal] Constitution does not require a lesser-included offense

instruction in non-capital cases." *Campbell v. Coyle,* 260 F. 3d 531, 541 (6'" Cir. 2001). Thus, the failure of a state trial court to instruct a jury on a lesser included offense in a non-capital case is not an error cognizable in federal habeas review. *Bagby v. Sowders,* 894 F. 2d 792, 797 (6" Cir. 1990).

In this case, petitioner is not entitled to habeas relief on his claim. The Michigan Court of Appeals determined that petitioner was not entitled to an instruction for the offense of accessory after the fact under Michigan law. Where a state court has reviewed a habeas petitioner's request for a lesser included offense instruction and concludes that it was not warranted by the evidence presented at trial, that conclusion is "axiomatically correct, as a matter of state law." *Bagby v. Sowders,* 894 F. 2d at 795. The Michigan Court of Appeals' decision that petitioner was not entitled to an instruction on accessory after the fact was not an unreasonable application of clearly established federal law, in light of the fact that accessory after the fact is not a lesser included offense to first or second-degree murder under Michigan law. See *David v. Lavinge,* 190 F. Supp. 2d 974, 985-87 (E.D. Mich. 2002).

Secondly, because there was sufficient evidence to find petitioner guilty of the offense of first-degree felony murder, petitioner is not entitled to habeas relief on this claim. *Reedus v. Stegall,* 197 F. Supp. 2d 767, 784 (E.D. Mich. 2001).

Petitioner also claims that the trial court gave an erroneous aiding and abetting instruction, because it failed to instruct the jury that he could not be

convicted as an aider and abettor if he assisted his co-defendants after their crimes had been committed. The Michigan Court of Appeals rejected this claim, because the jury instruction clearly informed the jurors that to find petitioner guilty as an aider and abettor, they must find that he assisted the co-defendants "before or during the crime or crimes." *People v. Langford,* Slip. Op. at * 6.

Where a state appeals court finds that the instruction given by the trial court accurately reflected state law, this Court must defer to that determination and cannot question it. *Seymour v. Walker,* 224 F. 3d 542, 558 (6111 Cir. 2000). In this case, because the Michigan Court of Appeals determined that the jury instruction accurately reflected the elements of aiding and abetting, petitioner is not entitled to habeas relief on this claim. See *Williams v. Withrow,* 328 F. Supp. 2d 735, 752-53 (E.D. Mich. 2004).

F. Claim # 8. The right to testify claim.

In his eighth claim, petitioner contends that the trial court erred in failing to ascertain whether petitioner wanted to testify or whether he wished to waive that right. As part of his ninth claim, petitioner contends that counsel was ineffective for failing to allow him to testify.

When a tactical decision is made by an attorney that a defendant should not testify, the defendant's assent is presumed. *Gonzales v. Elo,* 233 F. 3d 348, 357 (6th Cir. 2000). A trial court has no duty to inquire sua sponte whether a defendant knowingly, voluntarily, or intelligently waives his right to testify. *United*

States *v. Wabber,* 208 F. 3d 545, 551-52 (6'" Cir. 2000). In addition, a state trial judge is not constitutionally required to specifically address a criminal defendant and both explain that he has a right to testify and ask him whether he wishes to waive that right. *Siciliano v. Vose,* 834 F. 2d 29, 30 (1" Cir. 1987); See also *Liegakosv. Cooke,* 106 F. 3d 1381,1386(7'"Cir. 1997). Waiver of the right to testify may be inferred from a defendant's conduct. Waiver is presumed from the defendant's failure to testify or notify the trial court of the desire to do so. *Webber,* 208 F. 3d at 551. Here, petitioner did not alert the trial court at the time of trial that he wanted to testify. Thus, his failure to do so constitutes a waiver of this right. *Id.* Because the record is void of any indication by petitioner that he disagreed with counsel's advice that he should not testify, petitioner has not overcome the presumption that he willingly agreed to counsel's advice not to testify or that his counsel rendered ineffective assistance of counsel. *Gonzates,* 233 F. 3d at 357.

Moreover, petitioner's proposed testimony, which amounted to a "blanket denial" of his involvement in these crimes, would have had a minimal impact on the outcome of this case, in light of the impressive body of circumstantial and testimonial proof against petitioner. Petitioner has therefore failed to show that he was prejudiced by counsel's failure to permit him to testify, so as to support his ineffective assistance of counsel claim. See *Collins v. United States, 67* Fed. Appx. 888, 890 (6'" Cir. 2003).

G. Claim # 9. The ineffective assistance of counsel claims.

In his ninth claim, petitioner alleges the ineffective assistance of counsel. To prevail on his ineffective assistance of counsel claims, petitioner must show that the state court's conclusion regarding these claims was contrary to, or an unreasonable application of, *Strickland v. Washington,* 466 U.S. 668 (1984). See *Cathron v. Jones,* 190 F. Supp. 2d 990, 996 (E.D. Mich. 2002). *Strickland* established a two-prong test for claims of ineffective assistance of counsel: the petitioner must show (1) that counsel's performance was deficient, and (2) that the deficient performance prejudiced the defense. *Strickland,* 466 U.S. at 687.

Petitioner raises three claims of ineffective assistance of counsel in his petition. The Court has already rejected petitioner's first two ineffective assistance of counsel claims when addressing the related underlying substantive claims. The Court will therefore address petitioner's final ineffective assistance of counsel claim involving trial counsel's failure to impeach Antonio Barnett with testimony from petitioner's first trial, which ended in a hung jury. At petitioner's second trial, Barnett testified that he was present with petitioner when a news report about the kidnapping and shooting came on the television. Barnett testified that petitioner told him that "he was on the news" and that the reporters were incorrectly stating that he had raped a female. However, at petitioner's first trial, Barnett indicated that petitioner had told him during this conversation that he had not kidnapped anyone. Petitioner contends that counsel should have

brought up Barnett's past testimony in order to directly refute the prosecution testimony.

"[C]ourts generally entrust cross-examination techniques, like other matters of trial strategy, to the professional discretion of counsel." *Dell v. Straub,* 194 F. Supp. 2d 629, 651 (E.D. Mich. 2002). "Impeachment strategy is a matter of trial tactics, and tactical decisions are not ineffective assistance of counsel simply because in retrospect better tactics may have been available." *Id.*

In the present case, petitioner has failed to show that counsel's decision regarding the questions asked of Barnett was not strategic. Moreover, even if counsel was deficient in failing to cross-examine Barnett about this minor inconsistency in his testimony, petitioner has failed to demonstrate any reasonable probability that the proposed cross-examination would have affected the result of the proceeding, in light of the overwhelming evidence against him in this case. See *Moss v. Hofbauer,* 286 F. 3d 851, 866 (6'" Cir. 2002). The Court rejects petitioner's claim.

IV. Conclusion

The Court will deny the petition for writ of habeas corpus. The Court will also deny a certificate of appealability to petitioner. In order to obtain a certificate of appealability, a prisoner must make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). To demonstrate this denial, the applicant is required to show that reasonable jurists could debate

whether, or agree that, the petition should have been resolved in a different manner, or that the issues presented were adequate to deserve encouragement to proceed further. *Slack v. McDaniel,* 529 U.S. 473, 483-84 (2000). When a district court rejects a habeas petitioner's constitutional claims on the merits, the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims to be debatable or wrong. *Id.* A federal district court may grant or deny a certificate of appealability when the court issues a ruling on the habeas petition. *Castro v. United States,* 310 F. 3d 900, 901 (6'" Cir. 2002).

For the reasons stated in this opinion, the Court will deny petitioner a certificate of appealability because he has failed to make a substantial showing of the denial of a federal constitutional right. *Dell,* 194 F. Supp. 2d at 659.

V. ORDER

Based upon the foregoing, IT IS ORDERED that the petition for a writ of habeas corpus is **DENIED WITH PREJUDICE.**

IT IS FURTHER ORDERED That a certificate of appealability is **DENIED.**

s/Bernard A. Friedman
HON. BERNARD A. FRIEDMAN
CHIEF UNITED STATES DISTRICT JUDGE
DATED: July 7, 2006

Order **Michigan Supreme Court**

Entered: December 30, 2003 **Lansing. Michigan**

124397 & (97)

PEOPLE OF THE
STATE OF MICHIGAN,
Plaintiff-Appellee,

v

JAMES LANGFORD,

Defendant-Appellant.

Maura D. Corrigan
Chief Justice
Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Robert P. Young, Jr.
Stephen J. Markman
Justices

SC: 124397
COA: 244885
Wayne CC: 99-000610-02

/

On order of the Court, the application for leave to appeal the July 1, 2003 order of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court. The motion to remand is also considered, and it is DENIED.

[SEAL]

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

December 30, 2003 /s/ Corbin R. Davis
Clerk

STATE OF MICHIGAN COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

UNPUBLISHED July 1,2003

Plaintiff-Appellee,

v

No. 235163
Wayne Circuit Court
LCNo.99-00610-02

JAMES LANGFORD,

Defendant-Appellant.

Before: Cavanagh, P.J., and Gage and Zahra, JJ.
PER CURIAM.

Defendant was convicted by a jury, as charged, of two counts of first-degree felony murder, MCL 750.316(l)(b), four counts of assault with intent to commit murder, MCL 750.83, one count of armed robbery, MCL 750.529, two counts of extortion, MCL 750.213, two counts of kidnapping, MCL 7,50.349, and one count of possession of a firearm during the commission of a felony, MCL 750.227b. At sentencing, the court determined that the two felony murder convictions were merged into one (one death, two theories), and that the underlying felonies of armed robbery, extortion, and kidnapping were all merged into the felony murder conviction. The court sentenced defendant to concurrent prison terms of life imprisonment without parole for the felony murder conviction, sixty to ninety years for the first assault conviction, forty to sixty years for the second assault conviction, and thirty to sixty years for each of the two remaining assault convictions, to be served consecutive to a two-year term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

This case arises out of events that occurred on December 5, 1998. The events began with the kidnapping of Athena Akins and her son, Leroy Akins. After the victims

were released, a police pursuit ensued, which culminated in the death of one officer and injuries to several others. Defendant later fled to Erie, Pennsylvania, where he was eventually apprehended.

Defendant raised several claims of prosecutorial misconduct. Defendant's first claim is that the prosecutor committed misconduct when he commented that a defense witness was laughing outside the courtroom following her testimony. Claims of prosecutorial misconduct are reviewed on a case by case basis, and the challenged remarks are reviewed in context. *People v*

-1-

Noble, 238 Mich App 647, 660; 608 NW2d 123 (1999). The test for prosecutorial misconduct is whether the defendant was deprived of a fair trial. *People v Bahoda,* 448 Mich 261,266-267 and nn 5-7; 531 NW2d 659 (1995). Here, however, defendant failed to preserve this issue with an appropriate objection at trial. Therefore, we review this issue for plain error (i.e., one that is clear and obvious) affecting defendant's substantial rights (i.e., that was prejudicial). *People v Carines,* 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Schutte,* 240 Mich App 713, 720; 613 NW2d 370 (2003).

brief remark did not amount to plain error affecting defendant's substantial rights. *People v Watson,* 245 Mich App 572, 592-593; 629 NW2d 411 (2001).

during opening statement that he was "ecstatic" that the immunized witness would be going to prison. A party may not merely announce a position and leave it to this Court to discover and rationalize the basis for the claim. W*atson, supra* at 587. Similarly, defendant fails to cite any authority in support of his argument that the prosecutor committed misconduct by eliciting an alternative explanation for the fact that defendant did not talk about this crime with the FBI negotiator during the Pennsylvania standoff. Thus, that issue

is also deemed abandoned. *People v Davis,* 241 Mich App 697, 700; 617 NW2d 381 (2000).

arguments that appealed to the fears and prejudices of the jurors, *People v Schmitz,* 231 Mich App 521, 533; 586 NW2d 766 (1998). The comment concerning Officer Bandy's father was brief and isolated and did not deprive defendant of a fair trial. The comment concerning what justice required was made in reference to the evidence at trial and concerned what the evidence showed. It was not improper. The comments concerning the victim crying out for justice and asking the jury not to compound this tragedy were made in direct response to defendant's argument that the victim would not want defendant to be convicted. Considered in this context, the comments were not improper, *Watson, supra* at 592-593- Moreover, the court instructed the jury that the case must be decided solely on the evidence, without sympathy or prejudice, and that comments and arguments of counsel are not evidence. Thus, none of these comments deprived defendant of a fair trial.

evidence. In light of their responsive nature, the prosecutor's remarks, which did not receive an objection at trial, were not plainly improper. *Watson, supra* at 592-593, Therefore, this unpreserved issue has been forfeited. *Cannes, supra* at 763.

Next, defendant argues that the trial court erred in allowing the prosecutor to rehabilitate a witness with prior consistent statements made after a motive to fabricate had arisen. A trial court's decision to admit or exclude evidence is reviewed for abuse of discretion. *People v Smith,* 456 Mich 543, 550; 581 NW2d 654 (1998). By the time the prosecutor attempted to rehabilitate the witness, the witness' statements had already been admitted into evidence. Because the statements had already been received, and defendant had cross-examined the witness extensively concerning inconsistent portions of the statements, the trial court did not abuse its discretion in allowing the prosecutor to explore those portions that were consistent with the witness' trial testimony. See MRE 61 l(a). Defendant additionally argues, however, that the statements should never have been admitted in the first instance. We find merit to this issue, but conclude that any error does not warrant reversal.

Under MRE 801(d)(l), a prior statement of a witness is not inadmissible hearsay if

> [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive ....

A prior consistent statement is admissible under MRE 801(d)(l) only if it was made before the existence of a motive to fabricate. See *People v McCray,* 245 Mich App 631, 642; 630 NW2d 633 (2001); see also *People v Jones,* 240 Mich App 704, 707; 613 NW2d 411 (2000).

In this case, the witness gave statements to the police that were both consistent and inconsistent with his trial testimony. Because the statements were not given under oath at a trial or a hearing, they were not excluded from the definition of hearsay by MRE 801(d)(l)(A) (prior inconsistent statements). Similarly, the statements were made after the witness was arrested and a motive to fabricate had already arisen. Thus, the statements were also not excluded from the definition of hearsay by MRE 801(d)(l)(B) (prior consistent statements). Therefore, it appears that the trial court erred in admitting the entire statements- We conclude, however, that the error was harmless. Defense counsel cross-examined the witness extensively concerning the portions of the statements that were inconsistent with his trial testimony, and the consistent portions were cumulative of the witness' trial testimony- Thus, the substance of the statements was already before the jury. Under the circumstances, any error in admitting the statements did not affect the outcome of the trial. *People v Lukity,* 460 Mich 484,495; 596 NW2d 607 (1999).

III

Next, defendant argues that the trial court erred in precluding defense counsel from cross- examining the same witness concerning the possible penalty he avoided by entering into a plea agreement with the prosecution. We agree, but again conclude that reversal is not required.

Where a witness testifies under a grant of immunity pursuant to a plea agreement, the defense must be given a full opportunity to cross-examine the witness concerning the terms of the plea agreement. *People v Jones,* 236 Mich App 396, 405; 600 NW2d 652 (1999). m *People v Bell,* 88 Mich App 345, 349; 276 NW2d 605 (1979), this Court held that the trial court abused its discretion where it prohibited the defendant from cross-examining the prosecution's "star witness" concerning the penalty he faced before entering into a plea agreement. See also *People v Mumford,* 183 Mich App 149, 153-154; 455 NW2d 51 (1990) (trial court abused its discretion when it prohibited inquiry on all details of a plea bargain, including sentencing considerations). In contrast, in *People v Holliday,* 144 Mich App 560, 564-570; 376 NW2d 154 (1985), where there was no evidence that a witness had participated in the crime, this Court held that it was not an abuse of discretion to preclude the defendant from "questioning" the eyewitness about the possible punishment the witness may have avoided by agreeing to testify."

In the present case, there was ample evidence that the witness was an active participant in the crime, and the witness had been charged with felony-murder as well as several other serious felonies. The witness' desire to avoid the penalties associated with these charges was a powerful incentive to testify against defendant. While a jury is not ordinarily entitled to know the penalties faced by a defendant, *Holliday, supra* at 568; *Bell, supra* at 350, we agree that information concerning the possible penalties the witness here avoided by entering into the plea agreement was a proper subject of inquiry. *Mumford, supra; Bell, supra.* It is apparent, however, that the witness was vigorously cross-examined concerning his involvement in the crime and his motivation for testifying. Moreover, defense counsel was successful in eliciting that, if the witness had not cooperated with the prosecution, he would have faced a substantial sentence,

"more than [he] could ever do." Further, during cross-examination of another witness, defense counsel mentioned that a charge of accessory after the fact to murder carried a penalty of "life in prison." We are satisfied that the jury had a sufficient basis on which to adequately evaluate the witness' incentives for testifying. It is not more probable than not that the jury would have evaluated the witness' testimony differently had further inquiry been permitted. *Lukity, supra* at 495.

Defendant next argues that the trial court erred in refusing to reconsider a motion to suppress his statement that was previously considered and denied by a different judge before defendant's first trial. The trial court concluded that it was bound by the first judge's ruling and, therefore, had no authority to reconsider the issue.

MCR2.613(B) states:

> A judgment or order may be set aside or vacated, and a proceeding under a judgment or order may be stayed, only by the judge who entered the judgment or order, unless that judge is absent or unable to act. If the judge who entered the judgment or order is absent or unable to act, an order vacating or setting aside the judgment or order or staying proceedings under the judgment or order may be entered by a judge otherwise empowered to rule in the matter.

Under this rule, the trial court had the authority to reconsider the admissibility of defendant's Statement.

Nonetheless, to be entitled to relief, it is incumbent on defendant to demonstrate that he was prejudiced by the erroneous ruling, i.e., that, had the trial court considered the matter, there is a reasonable basis for believing that it would have suppressed defendant's statement. Defendant does not address the merits of the issue on appeal. Because this is an issue that must necessarily be decided, defendant's failure to address it precludes appellate relief. *Roberts & Son Contracting, Inc v North Oakland Development Corp,* 163 Mich App 109, 113,413 NW2d 744 (1987). In any event, we agree that the statement was admissible.

It is well-settled that the police must advise a suspect of his *Miranda'* rights before a custodial interrogation. *People v Dennis,* 464 Mich 567, 572-573; 628 NW2d 502 (2001). For purposes of *Miranda,* "custodial interrogation" is "questioning initiated by law enforcement officers after a person has been taken into custody or [has] otherwise [been] deprived of his freedom of action in any significant way." *People v Coomer,* 245 Mich App 206, 219; 627 NW2d 612 (2001), quoting *People v Zahn,* 234 Mich App 438, 449; 594 NW2d 120 (1999). For example, a defendant who is incarcerated on an unrelated charge is not "in custody" for purposes *of Miranda.* See *People v Herndon,* 246 Mich App 371, 396; 633 NW2d 376 (2001).

In the present case, although defendant was barricaded in a house that was surrounded by police, he was not "in custody" when he made the challenged statement. More importantly, he voluntarily got on the telephone, asked someone to place a three-party call for him, and voluntarily spoke to the police officer in question. Thus, for purposes of *Miranda,* there was no custodial interrogation initiated by law enforcement officers. Accordingly, the challenged statement was admissible. Because defendant's substantial

rights were not affected by the trial court's failure to recognize its authority to consider the issue, appellate relief is not warranted. *In re Caldwell,* 228 Mich App 116,123-124; 576 NW2d 724 (1998).

Defendant next argues that the trial court erred by refusing to instruct the jury on accessory after the fact, and by failing to add language to the aiding and abetting instruction advising the jury that, to find defendant guilty as an aider and abettor, it must find that he provided assistance before or during the crime. We disagree.

Claims of instructional error are reviewed de novo. *People v Hail,* 249 Mich App 262, 269; 643 NW2d 253 (2002). Jury instructions are reviewed as a whole rather than piecemeal to establish error. *People v Dabish,* 181 Mich App 469, 478; 450 NW2d 44 (1989). Even if somewhat imperfect, instructions are not grounds for reversal if they fairly present the issues to be tried and sufficiently protect the defendant's rights. *People v Gaydosh,* 203 Mich App 235, 237; 512 NW2d 65 (1994).

' *Miiranda v Arizona.* 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

The court gave the standard jury instructions on aiding and abetting. CJI2d8.1, CJI2d 8.4 and CJI2d 8.5. The jury was specifically instructed that, in order to convict defendant on an aiding and abetting theory, it must find that he gave assistance "before or during the crime or crimes." The instruction given fairly addressed defendant's concern that he not be convicted as an aider and abettor on the basis of assistance rendered only after the crime. There was no error concerning the aiding and abetting instructions.

Accessory after the fact is a common law crime punishing "one, who with knowledge of another's guilt, renders assistance to a felon in an effort to hinder his detection, arrest, trial or punishment." *People v Perry,* 460 Mich 55, 59, 61; 594 NW2d 477 (1999). This offense is akin to obstruction of justice. *Id* at 62. Contrary to what defendant argues, accessory after the fact is not a cognate lesser included offense of murder. *Id.* at 62-63. Further, even if it could be considered a lesser cognate offense of murder, the trial court's failure to instruct on that offense was not en-or because MCL 768.32 does not permit instruction on lesser cognate offenses. *People v Cornell,* 466 Mich 335, 353-359; 646 NW2d 127 (2002).

Next, we reject defendant's claim that the trial court erred in allowing defense counsel to rest his case without ascertaining whether defendant knowingly and intelligently waived his right to testify. In Michigan, where a defendant is represented by counsel, a trial court has no duty to inquire into the defendant's waiver of the right to testify. *People v Bell,* 209 Mich App 273, 277; 530 NW2d 167 (1995).

Lastly, defendant argues that his trial attorney was ineffective (1) for failing to object on confrontation grounds to the prosecutor's comment that a witness was laughing, (2) for depriving defendant of his right to testify, and (3) for

failing to impeach a witness with testimony from defendant's first trial. Where, as here, a defendant fails to raise the issue of ineffective assistance of counsel in a motion for a new trial or *Ginther 2* hearing, our review of the issue is limited to mistakes apparent on the record. *People v Hurst,* 205 Mich App 634, 641; 517 NW2d 858 (1994).

To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that he or she was not performing as the attorney guaranteed by the constitution. *People v Pickens,* 446 Mich 298, 302-303; 521 NW2d 797 (1994). The defendant must overcome the presumption that the challenged conduct might be considered sound trial strategy and must further show that the error might have made a difference in the outcome of the trial. *People v LaVearn,* 448 Mich 207, 216; 528 NW2d 721 (1995); *Pickens, supra* at 312, 314. Every effort must be made to eliminate the distorting effects of hindsight. *LaVearn, supra* at 216.

2 *People v Ginther,* 390 Mich 436,443; 212 NW2d 922 (1973).

As discussed above, the prosecutor's comment that a prior witness had been laughing outside the courtroom was a permissible response to the witness' volunteered statements. Defense counsel was not ineffective for failing to make a futile objection. See *People v Kulpinski,* 243 Mich App 8, 27; 620 NW2d 537 (2000).

The record does not disclose what advice, if any, defense counsel provided concerning the decision whether to have defendant testify. Because it is not apparent from the record that defense counsel improperly prevented defendant from testifying, this claim must fail.

Defendant lastly complains that defense counsel failed to impeach a witness with his prior trial testimony in which the witness stated that, on the night after the crime, defendant denied any involvement in the kidnapping. Unless a defendant can overcome the presumption of sound trial strategy, whether and how to impeach witnesses is a matter of trial strategy entrusted to counsel's professional judgment. *People v Flowers, 111* Mich App 732, 737; 565 NW2d 12 (1997). In this case, there is no reasonable possibility that pointing out one more alleged inconsistency in this witness' testimony would have changed the outcome. Defendant has failed to show that counsel committed serious prejudicial error.

Affirmed

/s/ Mark J. Cavanagh
/s/ Hilda R. Gage
/s/ Brian K. Zahra